Supreme Court, U.S.
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No. 05-1485

IN THE

# Supreme Court of the United States

JOSEPH S. MARESCA,

*Petitioner Pro Se,*

*v.*

DR. ELLIOT L. MANCALL, MD and
THOMAS JEFFERSON UNIVERSITY HOSPITAL,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT DR. ELLIOT L. MANCALL, MD

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals for the Third Circuit erred by ruling/affirming the ruling that Petitioner Maresca failed to establish, through the required expert medical testimony, that Respondent Dr. Mancall breached the applicable standard of care or that said breach was the cause of, or a substantial factor in, bringing about Maresca's alleged injuries?

2. Whether the District Court properly applied the Federal Rules of Civil Procedure and Pennsylvania substantive law without error or omission, prejudicial or otherwise and Maresca had every full and fair opportunity to present his case and procure an expert opinion on standard of care and causation?

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## STATEMENT OF THE CASE

This is a medical malpractice and corporate liability action initiated on September 7, 2001 by Petitioner, Pro Se Plaintiff Joseph Maresca, against Respondents, Defendants, Elliott L. Mancall, M.D. [hereinafter known as "Dr. Mancall") and Thomas Jefferson University Hospital (TJUH). Maresca alleges in his Complaint that Dr. Mancall failed to properly diagnose Maresca as suffering from ankylosing spondylitis during an office visit on December 5, 1996, or, to properly follow-up with Maresca thereafter.

### A. Procedural History

Petitioner Maresca commenced this action by filing a Praecipe to Issue a Writ of Summons in the Court of Common Pleas of Philadelphia County. On October 29, 2001, this case was removed to the United States District Court for the Eastern District of Pennsylvania based on diversity jurisdiction. On or about February 13, 2002, Maresca filed a Complaint in the District Court. *See Maresca v. Mancall*, 2004 U.S. Dist. LEXIS 8658 (E.D. Pa., May 11, 2004). This matter was assigned to the Honorable Legrome D. Davis, Jr. Although Maresca's pleadings were far from clear, the District Court determined that Maresca had adequately pled a claim against Dr. Mancall for medical negligence, a claim against TJUH for corporate liability, and, a claim that TJUH was vicariously liable for Dr. Mancall's alleged negligence.

In the course of this litigation, the District Court issued an Amended Scheduling Order, ordering Maresca's Expert Discovery to be completed by November 18, 2002. Maresca provided two pre-trial reports from a neurologist, Mitchell S. Felder, M.D., his sole medical expert witness in this case.

Maresca also submitted Expert Letters, Submissions and Memorandum Describing Experts, Other Medical Providers and an Interrogatory of Dr. Abel, M.D. Maresca's Submission identified eight (8) potential experts: Dr. Mitchell Felder, neurologist; Charles Deng, acupuncturist; Dr. John Waterman, internal medicine and rheumatologist; Dr. Carter Abel, dermatologist; Dr. Kellman, internal medicine; Dr. Simon Lee, anatomy and cellular biologist; Dr. Majid Ali, pathologist; Dr. Alan Ebringer, cellular and bimolecular scientist. Both Defendants moved for summary judgment which the District Court denied by order of June 20, 2003, on the basis of Dr. Felder's written reports which were exchanged during discovery.

The final pre-trial conference was held on December 11, 2003. Thereafter, Dr. Mancall filed a Motion in Limine as to any expert other than Dr. Felder, inasmuch as none of Maresca's proposed experts could meet the requirements of the Federal Rules of Civil Procedure. The District Court granted Dr. Mancall's Motion in Limine on February 4, 2004[1].

At the second pre-trial conference and hearing on May 3, 2004, the Defendants presented argument on their respective Fed.R.Civ.P. 50 Motions. The District Court determined that they were premature because trial had not yet commenced.

At trial, Maresca presented Dr. Felder as his only medical expert witness. Dr. Felder testified via videotape deposition. At the close of Maresco's case, both Respondents, Thomas Jefferson University Hospital and Dr. Mancall renewed their

1. Maresca does not raise the issue of the grant of the Motion in Limine, on appeal. Even if he did, the District Court's ruling was in accordance with the facts and the law.

earlier Fed.R.Civ.P. 50 Motions for Judgment as a Matter of Law on the basis that Dr. Felder failed to provide expert medical testimony from which a jury could find that either Defendant breached a standard of care to Maresca, or that any alleged breach was the cause of any injury. The District Court held a lengthy two hour hearing on these motions on May 5, 2004, giving Maresca every opportunity to oppose the Defendants' motions[2]. By order of May 10, 2004, the District Court granted both Defendants' Motions for Judgment as a Matter of Law. *Maresca v. Mancall*, 2004 U.S. Dist. LEXIS 8658. The District Court further denied Maresca's Motion for reconsideration.

In its opinion, the District Court reasoned that Dr. Felder's testimony was insufficient to establish a deviation from the medical standard of care. *Id.* at *9. The District Court held that Dr. Felder's testimony failed to express the requisite degree of medical certainty, inasmuch as he testified that his opinion resulted from medical information not available to Dr. Mancall at the time of his diagnosis. *Id.*, at *8. The District Court further opined that nothing in Dr. Mancall's December 5, 1996 or Maresca's subsequent letters to Dr. Mancall indicated a history of complaint of progressive neck stiffness or pain by Maresca. *Id.* at *9. The District Court also noted that Dr. Felder testified that Dr. Mancall's request for an MRI and medication were appropriate, that the record indicated subsequent efforts by Dr. Mancall to follow up, and that the information available to Dr. Mancall would not suggest the need for a back examination. *Id.* at *9.

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2. The District Court cites to the Hearing notes, as well as Dr. Felder's testimony, in its opinion supporting its May 10, 2004 order and judgment. *See Maresca, supra*, at *3, *8,-*12, *15-*17,

The District Court also found that even if the testimony could be viewed as a deviation from the requisite standard of care, "the necessary showing of causation is wholly absent." *Id.* at *9. At no point did Dr. Felder assert that Dr. Mancall could have prevented or cured Maresca's condition had he discovered it earlier *Id.*, at *10. Rather, Dr. Felder acknowledged that there is no cure, definitive treatment or medication that can alter the natural progression of the disease. *Id.*, at *10. The District Court further held that even under a "substantial factor" test, Dr. Felder never articulated any difference in Maresca's ultimate prognosis that resulted from Dr. Mancall's alleged mis-diagnoses, nor did Dr. Felder identify any resulting injuries. *Id*, at *12. The District Court also stated that in response to its request to point to any instance in which Dr. Felder discussed causation, Maresca "instead read from treatises, pointed to exhibits not in evidence and conjectured about testimony he expected to elicit from defense witnesses." The Court also observed that even under a standard requiring a more relaxed degree of expert certainty, Dr. Felder's testimony was "critically deficient" to show that any care provided by Dr. Mancall was a factor in causing or increasing the risk of Maresca's injuries. Dr. Felder still never articulated any difference in Maresca's prognosis, or resulting injuries, from Dr. Mancall's alleged failure to diagnose Maresca on December 5, 1996.

The District Court also found that, inasmuch as Maresca filed to establish causation as to Dr. Mancall, the vicarious liability claim against TJUH must fail. Maresca also could not establish a corporate liability claim against TJUH because Dr. Felder never testified that TJUH breached a standard of care.

The Third Circuit affirmed the District Court by order and opinion of June 16, 2005. *Maresca v. Mancall*, 135 Fed. Appx. 529 (3d Cir. 2005). The Third Circuit Court agreed with the District Court that Dr. Felder did not testify within a reasonable degree of medical certainty that the Defendants breached the standard of care, or that any such alleged breach was the cause of the alleged injuries. The Third Circuit further held that Maresca's reliance upon Dr. Felder's report was misplaced, both in that the report did not provide sufficient evidence from which a jury could have found in Maresca's favor and in that the report was never admitted into the trial record and could not be considered as evidence by a jury. By order of December 19, 2005 the Third Circuit denied Maresca's Petition for Panel Rehearing. The Third Circuit also denied Maresca's Motion for Leave to File Exhibits in a Panel Rehearing in which Maresca attempted to supplement his appeal with matters not of record.

**B. Factual Background**

Petitioner Maresca's version of the facts of this case is incomplete and otherwise inaccurate. Maresca's Petition for Writ of Certiorari, like his Third Circuit Brief, contains frequent references to hearsay expert reports and testimony which is not of record[3]. Petitioner Maresca's only medical expert witness was Dr. Felder. Petitioner Maresca's Appendix contains documents and testimony not of record, which should not be considered by this Court.

This case concerns the medical treatment provided to Petitioner Maresca by Respondent Dr. Mancall. Dr. Mancall

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3. Maresca presented the testimony of Dr. Deng, an acupuncturist, but only as a fact witness.

examined Maresca on December 5, 1996. Dr. Mancall diagnosed Mancall with chronic headaches and prescribed muscle relaxants. Maresca alleges, however, that when Dr. Mancall examined him on December 5, 1996, Dr. Mancall should have identified Maresca's symptoms as corresponding to the medical condition ankylosing spondylitis, should have diagnosed this condition, and, that the alleged failure to diagnose this condition resulted in his continued suffering from and progression of this condition. Maresca maintains that he did not realize that he was suffering from ankylosing spondylitis until almost three (3 )years later when he was diagnosed with the disease by a rheumatologist in September 1999.

Petitioner Maresca presented the testimony of only one medical expert, Dr. Felder. Dr. Felder's testimony is more notable for its omissions than its substance. Dr. Felder never offered any opinions that Respondent Dr. Mancall's alleged negligence caused any injuries to Petitioner Maresca. Dr. Felder never explained how Maresca's ultimate prognosis would have differed if Dr. Mancall had diagnosed him with ankylosing spondylitis on December 5, 1996, or what injuries Maresca allegedly suffered as a result of Dr. Mancall's alleged mis-diagnosis and failure to follow-up with the patient. Dr. Felder never asserted that Dr. Mancall could have cured Maresca's condition, had there been an earlier diagnosis. To the contrary, Dr. Felder acknowledged that there was no cure or definitive treatment for ankylosing spondylitis and there is no known medication that can alter the natural progression of the disease (A. 132). Also, Dr. Felder never stated that Maresca actually experienced any of these risks that he identified in his testimony, let alone that any such injuries resulted because Dr. Mancall did not diagnose Maresca's condition earlier.

Dr. Felder also retreated from, and clarified, his previous this testimony during cross-examination. On direct examination Dr. Felder testified that Maresca's symptoms, as reported to Dr. Felder by Maresca, should have been diagnosed as ankylosing spondylitis (A. 107, 108). On cross-examination Dr. Felder conceded however, that his opinion was based upon *medical information not available* to Dr. Mancall. (A. 126-129). Dr. Felder testified that he based his opinion upon Maresca's representation to Dr. Felder that Maresca demonstrated certain physical limitations to Dr. Mancall (R. 128). Based upon this information that Dr. Felder received from Maresca, Dr. Felder suggested additional examinations that Dr. Mancall could have performed, such as head movements or involving the spine, neck posture, pelvis and thigh rotation and testified that a doctor should respond to a patient's written correspondence. (A. 107-111, 118)

However, Dr. Felder acknowledged that nothing in Dr. Mancall's records or the subsequent letters from Maresca to Dr. Mancall, indicated a history of complaints of progressive neck stiffness or pain: they simply referred to "headaches" (A. 127-129). Dr. Felder conceded that, absent complaints of neck pain and stiffness, Dr. Mancall's diagnosis was appropriate. (A. 128).

Dr. Felder also testified that Dr. Mancall's request for an MRI and medication were appropriate, and agreed that Dr. Mancall made a recommendation for a plan of care (A. 126). Dr. Felder conceded that the record indicated subsequent efforts by Dr. Mancall to follow up with Maresca's care, and further, that the information available to Dr. Mancall would not suggest the need for a back examination (A. 128, 129).

## REASONS FOR DENYING THE PETITION

### A. Petitioner Maresca has failed to present any compelling reasons to grant review pursuant to Supreme Court Rule 10 or otherwise.

Petitioner Maresca has failed to present any considerations pursuant to which this Court should exercise its discretion to grant review, as set forth in Supreme Court Rule 10. Here the Third Circuit's decision affirming the District Court's grant of Defendants' Fed.R.Civ.P. 50 motions, is not in conflict with the decision of any other United States court of appeals on the same matter. The Third Circuit has not decided a federal question here at all, much less one in a way which conflicts with a decision by a state court of last resort. The Third Circuit has neither departed from the accepted and usual course of judicial proceedings, nor has it sanctioned any such departure by the District Court. Additionally, the Third Circuit has not decided an important question of federal law which has not been, but should be, settled by this Court, nor has it decided an important federal question in a way that conflicts with relevant decisions of this Court.

Here the asserted errors are fact and case specific and relate solely to the District Court's assessment of whether the Petitioner Maresca's sole medical expert witness Dr. Felder testified within a reasonable degree of medical certainty that the Defendants breached a standard of care or that said breach was the cause of the Maresca's injuries, such that the case could be presented to a jury.

**B. The District Court did not err by granting judgment pursuant to Fed.R.Civ.P. 50 in that Maresca failed to establish that Dr. Mancall breached the standard of care or that said breach was the cause of, or a substantial factor in, bringing about his alleged injuries.**

The District Court properly granted judgment as a matter of law in favor of Dr. Mancall at the close of Maresca's case, because Maresca could not state a prima facie case against Dr. Mancall on any of his claims. The testimony of Maresca's sole medical expert, Dr. Felder failed to satisfy Maresca's burden of proving with expert medical testimony within a reasonable degree of medical certainty, that Dr. Mancall breached the requisite standard of care or that Dr. Mancall's alleged breach caused any injury to Maresca.

In order to present a prima facie case of medical malpractice, Maresca was required to prove: (1) The standard of care for the health care providers in defendant's position, at the time of the injury, under the same or similar circumstances, in treating a patient exhibiting the same symptoms as the plaintiff; (2) That the care accorded to the plaintiff by any defendant failed to meet the standard of care applicable in that time period; (3) That the specific failure to comply with the standard of care was a substantial factor in the cause of the injuries complained of by the plaintiff; and; (4) That the plaintiff's injuries were the result of the failed conduct. *Lambert v. Soltis*, 221 A.2d 173 (Pa. 1966); *Demchuk v. Bralow*, 170 A.2d 868 (Pa. 1961). The plaintiff is required to "offer an expert witness who will testify 'to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause

of the harm suffered.'" *Eaddy v. Hamaty*, 694 A.2d 639, 642 (Pa. Super. 1997) (*quoting Mitzelfelt v. Kamrin*, 549 A.2d 935 (Pa. Super 1988)).

A correct interpretation of Pennsylvania substantive law was applied by both the District Court and Third Circuit. Here Dr. Felder's testimony was simply insufficient to satisfy either prong of the requisite analysis.

First, Dr. Felder never testified within a reasonable degree of medical certainty that Dr. Mancall caused any injury to Maresca as required by Pennsylvania substantive law. *See Hoffman v. Brandywine Hosp.*, 661 A.2d 397, 402 (Pa. Super. 1995). An expert opinion based upon mere possibilities, guesswork or conjecture is not competent evidence. *Al Hamilton Contracting Co. v. Department of Envtl. Resources*, 659 A.2d 31, 36 (Pa. Cmwlth. 1995); *Childers v. Power Line Equip. Rentals, Inc.*, 681 A.2d 201, 209 (1996), *allocatur denied*, 690 A.2d 236 (Pa. 1997). "An expert fails this standard of certainty if he testifies that the alleged cause 'possibly,' or 'could have' led to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result." *Hoffman* at 402 (*quoting Kravinsky v. Glover*, 396 A.2d 1349, 1356 (Pa. Super. 1979)). While the expert need not testify with absolute certainty or rule out all conceivable causes of the plaintiff's condition, the expert does not state with a reasonable degree of certainty that the plaintiff's injuries occurred because of the negligence of any of the defendants, then plaintiff has failed to establish a prima facie case. *Mitzelfelt, supra*; *Kravinsky v. Glover*, 396 A.2d 1349 (Pa. Super. 1979).

Maresca cites no support for his contention that ankylosing spondylitis sufferers were not adequately protected under Pennsylvania law by reason of the District Court's decision. Moreover, the District Court did apply Pennsylvania substantive law as set forth in *Mitzelfelt*, *supra*, and other decisions, by analyzing Maresca's evidence under the less stringent standard of "substantial factor."

Maresca also cites no authorities in support of his argument that the concept of causation is "irrelevant" in an ankylosing spondylitis case because it is incurable or that Pennsylvania substantive law was interpreted in any way at odds with itself or federal law, if indeed any federal law was applicable here. Maresca does not cite any authorities for the proposition that his federal rights were abridged by 'local practice" in applying substantive Pennsylvania law on medical malpractice. Nothing in the District Court or Third Circuit's opinions suggest that either court has confused the concept of causing ankylosing spondylitis per se, with causing injury, pain or suffering from ankylosing spondylitis. Maresca cites no authorities for his proposition that expert medical testimony was not required here. Moreover, any alleged discrepancies among the "federal" and "state" definitions of ankylosing spondylitis are completely irrelevant. The applicable law was not ambiguous nor was it erroneously applied.

Here there was simply no unequivocal medical expert testimony attributing any injuries to an alleged late diagnosis of ankylosing spondylitis. Dr. Felder never testified that Maresca suffered any injuries or pain as a result of Dr. Mancall's alleged negligence. Dr. Felder never explained how Mr. Maresca's ultimate prognosis would have differed if Dr. Mancall had diagnosed him with ankylosing spondylitis on

December 5, 1996, or what injuries Mr. Maresca allegedly suffered as a result of Dr. Mancall's alleged mis-diagnosis and failure to follow-up with the patient. Dr. Felder never asserted that Dr. Mancall could have cured Maresca's condition, had there been an earlier diagnosis. To the contrary, Dr. Felder acknowledged that there is no cure or definitive treatment for ankylosing spondylitis and there is no known medication that can alter the natural progression of the disease (A. 132)

Maresca likewise could not set forth a prima facie case of medical malpractice under the "substantial factor" test, which the District Court did consider. Dr. Felder did not identify any injuries to Maresca caused by Dr. Mancall. While Dr. Felder opined that Maresca was at risk for certain life-threatening ailments, such as systemic vascular degeneration, during the period between December 5, 1996, and September 15, 1999, when Maresca was diagnosed as having ankylosing spondylitis, Dr. Felder never stated that Maresca actually experienced any of these risks, let alone that any such injuries resulted because Dr. Mancall failed to diagnose Maresca's condition earlier (A. 120, 121). Again, Dr. Felder also never explained how Maresca's ultimate prognosis would have differed with an earlier diagnosis. Dr. Felder's reference to a Crohn's disease exacerbation was not connected to any failure to diagnose by Dr. Mancall.

While Maresca repeatedly references Dr. Felder's expert report in his Petition, as he did below, this report was never entered into the trial record, thus is hearsay. Additionally, Maresca never asked Dr. Felder about the contents of his report regarding causation, during Dr. Felder's videotape deposition. Dr. Felder did not address causation in his trial deposition testimony, nor was he asked to. The only time Dr.

Felder affirmed the contents of his report, was when he confirmed that if there were no complaints of neck pain and stiffness made to Dr. Mancall, there would be no consideration or indication of ankylosing spondylitis (A. 131). Dr. Felder did not link Dr. Mancall's alleged negligence and Mr. Maresca's alleged injuries, let alone provide such testimony with the requisite degree of medical certainty.

Maresca also could not establish causation through other hearsay and "exhibits" not in evidence, medical treatises, or, testimony that he "expected" to elicit from Defendants' witnesses. Notably, although Maresca frequently cites to fact witness Dr. Deng's testimony, Dr. Deng was not Maresca's medical expert witness, Dr. Felder was, thus the District Court had every right to disregard Dr. Deng's testimony in determining whether Maresca presented a prima facie case.

Second, Dr. Felder's testimony could not establish a deviation from the standard of care for many reasons, including the fact that he never asserted that Dr. Mancall could have cured Maresca's condition had there been an earlier diagnosis. To the contrary, Dr. Felder acknowledged that his opinion was based upon medical information not available to Dr. Mancall at the time of the examination that there is no cure or definitive treatment for ankylosing spondylitis, and, there is no known medication that can alter the natural progression of the disease. (A. 126-129)

Dr. Felder also testified that he based his opinion upon Maresca's representation that Maresca demonstrated certain physical limitations to Dr. Mancall (R. 128). Significantly, Dr. Felder acknowledged that nothing in Dr. Mancall's

records or the subsequent letters from Maresca indicated a complaint of progressive neck stiffness or pain: they simply referred to "headaches" (A. 127-129). Dr. Felder explicitly testified that if there were *no complaints* of neck pain and stiffness made to Dr. Mancall, there would be *no consideration* or indication of ankylosing spondylitis and Dr. Mancall's diagnosis was appropriate (A. 128, 131).

Maresca also could not establish a deviation from the standard of care because Dr. Felder testified that Dr. Mancall's request for an MRI and medication were appropriate, and agreed that Dr. Mancall made a recommendation for a plan of care (A. 126). Dr. Felder conceded that the record indicated subsequent efforts by Dr. Mancall to follow up with Maresca's care, and further, that the information available to Dr. Mancall would not suggest the need for a back examination (A. 128), 129).

As set forth above, Maresca was plainly not entitled to have his case heard by a jury. Therefore, the District Court properly entered judgment as a matter of law in favor of Dr. Mancall pursuant to Fed.R.Civ. P. 50.

**C. The District Court properly applied the Federal Rules of Civil Procedure and Pennsylvania substantive law without error or omission, prejudicial or otherwise and Maresca had every full and fair opportunity to present his case and procure an expert opinion on standard of care and causation.**

In addition to properly applying Pennsylvania substantive law, the District Court did not overstep its bounds procedurally or otherwise abridge Maresca's due process rights. The District Court supplied an exacting analysis of the inadequacy of the evidence of record and explained its conclusions regarding the lack of evidence at length, with numerous citations to the testimony of Dr. Felder and the motion hearing record. It was Maresca who clearly failed to present sufficient medical expert testimony on the issue of causation to state a prima facie case for medical malpractice against Dr. Mancall. If the plaintiff's expert cannot form an opinion with sufficient certainty so as to make a professional judgment, there is nothing on the record from which a jury can make a legal judgment with sufficient certainty. *Kravinsky*, 396 A.2d at 1356.

Maresca cannot show any material errors or omissions, relevant or otherwise, regarding the District Court's conduct, the record, the evidence or the District Court dockets that would have any impact on the District Court's decision, prejudicial to Maresca, or otherwise. Maresca had every full and fair opportunity to present his case and procure an expert opinion on standard of care and causation. The District Court had no obligation to '"reserve judgment" and hear both sides of the case before granting judgment for the Defendants pursuant to Fed.R.Civ. P. 50, and indeed applied the proper sufficiency of the evidence analysis for such motions.

Maresca also cites no support for his proposition that application of the "reasonable person standard" at the close of his case was procedurally or legally incorrect.

The other arguments advanced by Maresca defy comprehension and cannot be addressed, even if they had not been waived below.

## CONCLUSION

For the foregoing reasons, Respondent Dr. Elliot L. Mancall, MD respectfully requests that the Petition for A Writ of Certiorari file by the Petitioner-Plaintiff Maresca, be denied.

Respectfully submitted,

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